FONG WAN REALTY SDN BHD A

v.

PJ CONDOMINIUM SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S2-22-1309-2002]
24 AUGUST 2009

CONTRACT: *Building contract - Breach - Defects - No notice as per sale and purchase agreement given to developer to repair defects - Whether purchasers may still sue developer for breach of contract - Clauses for consumer protection not to used to limit consumer's rights under common law - Housing Developers (Control and Licensing) Act 1966* C

CONTRACT: *Specific performance - Building contract - Defects in piping works - Whether purchaser entitled to decree of specific performance against developer for rectification works* D

LAND LAW: *Housing developers - Sale and purchase agreement - Housing Developers (Control and Licensing) Act 1966 - No notice as per sale and purchase agreement given to developer to repair defects - Whether purchasers may still sue developer for breach of contract - Clauses for consumer protection not to used to limit consumer's rights under common law* E

By a Sale and Purchase Agreement ('the agreement'), the plaintiff F purchased a condominium unit from the defendant (developer). The plaintiff claimed that there were defects in the condominium unit such as water leakages caused by the faulty piping system. The plaintiff in this action claimed damages amounting to RM11,800 and further sought to compel the defendant to carry out rectification G works to the piping system. The defendant claimed that since the plaintiff had not provided a written notice of the defects to the defendant within 12 months after the date of handing over of vacant possession, as required by cl. 26 of the agreement, the plaintiff's claim must fail. The defendant contended that the H plaintiff's claim was solely based on cl. 26. The defendant also argued that the facts in relation to the plea of specific performance had not been pleaded and in any event it would be difficult to compel and supervise any rectification works if ordered by the court.

I

Held (allowing the plaintiff's claim with cost):

(1) The defect liability clause does not take away the right to sue in respect of defects which are not discoverable. Even if the defects are discovered within the defect liability period, the provision of an express remedy for making good the defects does not take away the rights of the purchaser which follow at common law in a case of breach of contract. This is because the provisions in the agreement are statutory requirements governed by the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. These provisions are there for the protection of the purchaser and cannot be used to limit their rights under common law. Their purpose was to improve and supplement common law remedies. (para 10)

(2) Even if the plaintiff could not rely on cl. 26 of the agreement, the plaintiff could rely on the common law principles on breach of contract. The plaintiff had proven that the defendant was responsible for the defects in the piping system which caused water to leak and caused damaged to the plaintiff's condominium unit. (para 11)

(3) The facts in relation to the plea of specific performance were set out in the statement of claim. The works to be carried out could only be done by the defendant and not by the plaintiff as the piping system involved the whole condominium. Rectification was also confined to the piping system so it could easily be identified and resolved. In any case, parties could apply for further directions in the event that there were uncertainties. Only specific performance could satisfy the demands of justice in this case. (para 13)

Case(s) referred to:

KC Chan Brothers Development Sdn Bhd v. Tan Kon Seng & Ors [2001] 4 CLJ 659 HC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1987] 1 LNS 62 PC ***(refd)***

Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 CA ***(refd)***

Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 HC ***(refd)***

For the plaintiff - Kevin Wong Wye Keong; M/s Yeap & Yong
For the defendant - Douglas Yee; M/s Douglas Yee

Reported by Amutha Suppayah

JUDGMENT

Harmindar Singh Dhaliwal JC:

[1] By a sale and purchase agreement dated 11 July 1995, the plaintiff purchased a condominium unit from the defendant. The defendant was the developer of the condominium project later known as Ehsan Ria Condominium. The plaintiff claimed that after taking possession and sometime at the end of 1995 or early 1996, and to-date, there are obvious and visible defects in his condominium unit. In particular, the plaintiff is alleging that there are water leakages caused by the faulty piping system which have yet to be rectified. The plaintiff is now seeking an order for the defendant to carry out rectification works in relation to the piping system as well as damages and cost of repairs amounting to RM11,800.

[2] The defendant did not call any witnesses. Their defence is quite simple. They contend that the plaintiff's claim is solely based on cl. 26 of the sale and purchase agreement ("the agreement"). The defendant argues that since the said cl. 26 was not complied with, the plaintiff's claim must fail.

[3] Before I go into the issues relating to cl. 26 of the agreement and the cause of action of the plaintiff, an assessment of the evidence adduced in the trial is pertinent. I think the fact that there were defects due to leakage in the piping system can hardly be disputed. Apart from the plaintiff's oral testimony, there was the evidence of SP2 who was an architect and who testified that that the defects were due to leakages in the piping system. In his view, this was due to poor workmanship on the part of the defendant. There was no evidence to contradict this. So I considered that the plaintiff has proved that the defendant was responsible for the defects as the piping system was within the control of the defendant.

[4] I come now to the crux. The defendant is contending that notwithstanding the state of affairs of the piping system, the plaintiff's claim must fail as he has based his claim solely on cl. 26 of the agreement. Clause 26 of the agreement reads:

> Any defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twelve (12) calendar months after the date of handing over of vacant possession, and which are due to defective workmanship or materials or the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and descriptions specified in the First and Fourth Schedule as

A approved or amended by the Appropriate Authority shall be repaired and made good by the Vendor at its own costs and expense within thirty (30) days of having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property have not been made good by the Vendor, the Purchaser shall be entitled to
B recover from the Vendor the cost of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor.

Provided That the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the cost of
C repairing and making good the said defects, shrinkage and other faults before commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

D **[5]** Essentially, what the defendant is contending is that the plaintiff had to provide a written notice of the defects to the defendant within 12 months after the date of handing over of vacant possession. Since this was not done, the claim must fail.

E **[6]** The plaintiff, on the other hand, contends that the claim is based on breach of contract and is not just based on the agreement but also the common law principles regarding breach of contract.

[7] In this regard, a careful perusal of the pleadings shows that the defendant's interpretation of the pleadings is too narrow. The
F plaintiff is only required to plead all the material facts to prove this cause of action. This the plaintiff has done. It is then up to the plaintiff to show what legal principles are applicable to support his cause of action on the pleaded material facts.

G **[8]** I think the defendant was clearly aware of this as in para. 4 of the defence, the defendant is taking the stand that even for the defects which did not become apparent within the 12 months after the handing over of vacant possession, they are not obliged to repair and make good the defects. This I think shows that the defendant was conscious of the claim made outside the agreement.

H

[9] For these reasons, I think the defendant's argument in this regard is of little merit and must be rejected.

[10] As for the law in this regard, it is now accepted and settled that the defect liability clause does not take away the right to sue
I in respect of defects which were not discoverable. Even if the defects were discovered within the defect liability period, the provision of an express remedy for making good the defects does not take away the

rights of the purchaser which follow at common law in a case of breach of contract. The reason for this is that the provisions in the agreement are statutory requirements governed by the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. The relevant regulations are the Housing Developers (Control and Licensing) Regulations 1989 and the Housing Developers (Control and Licensing) Amendment Regulations 1994 and 1995. These provisions are there for the protection of the purchaser and cannot be used to limit their rights under common law. Their purpose was to improve and supplement common law remedies (see *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] 1 LNS 62; *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105; *KC Chan Brothers Development Sdn Bhd v. Tan Kon Seng & Ors* [2001] 4 CLJ 659; *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284).

[11] In my view, the defendants therefore cannot escape liability. Even if the plaintiff could not rely on cl. 26 of the agreement, the plaintiff could surely rely on the common law principle that I had adverted to in the pursuit of this claim. Considering the evidence that was adduced, I find that the plaintiff has proven that the defendant was responsible for the defects in the piping system which caused water to leak and caused damaged to the condominium unit of the plaintiff.

[12] The only question left to consider is the relief the plaintiff is seeking. In this regard, the defendant is contending that the facts in relation to the plea of specific performance have not been pleaded and in any event it would be difficult to compel and supervise any rectification works if ordered by the court.

[13] After careful consideration, I find great difficulty in accepting the defendant's submission in this regard. The facts in relation to the plea of specific performance are set out in the statement of claim. It is obvious that the plaintiff is seeking rectification works to the defects that are set out in the statement of claim. The plaintiff could either claim damages or seek specific performance. In this case, the works to be carried out can only be done by the defendant and not by the plaintiff as the piping system involves the whole condominium. Rectification is also confined to the piping system so it could easily be identified and resolved. In any case, parties can also apply for further directions in the event that there are uncertainties. I therefore consider that only specific performance would satisfy the demands of justice in this case. I would therefore order as follows:

A (1) That the defendant rectifies or repairs the piping system causing leakages to the plaintiff's condominium unit within six months from the date of judgment.

(2) That the plaintiff is entitled to the sum of RM11,800 as the cost of rectification works already carried out together with interest on the said sum at 8% per annum from date of judgment until realization.

(3) Costs to the plaintiff.

C (4) Parties are at liberty to apply to the Senior Assistant Registrar for further directions if the need arises.

[14] For the sake of completeness, I should also put on record that the parties had also recorded a consent judgment on the counterclaim of the defendant. The parties also agree that this claim will also attract interest at 8% per annum from date of the consent order until realization.